UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	)	Civ. No. 1:14-397 (AJT-IDD)
Plaintiffs,	)	Judge Anthony John Trenga
v.	)	Magistrate Judge Ivan D. Davis
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO FEC'S
MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF DISPUTED FACTS

The numbering of the following paragraphs is based on the FEC's Brief.

5. Stop PAC contributed $2,600 to Representative Joe Heck on July 7, 2014, and an additional $1,800 on October 3, 2014, after acquiring multicandidate status.

9. Plaintiffs dispute that Campbell was the "policy director" for Niger Innis' campaign. The record contains substantial evidence that Campbell was merely a "scribe" or a "writer" for the campaign. FEC Br. at 6[1] (citing Campbell Dep. 20:18-21:4, FEC Exh. 5; NIFC Dep. 31:10-21, 33:9-19, FEC Exh. 4). To the extent that conflicting evidence exists on this issue, all disputes must be resolved in favor of the non-movants (Plaintiffs) and against the FEC. *Reynolds v. Middleton*, No. 3:12-CV-779-JAG, 2013 U.S. Dist. LEXIS 148353, at *5 (E.D. Va. Oct. 15, 2013) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)).

15. Stop PAC never claimed that "its use of 'some of the same vendors' would preclude it [*i.e.*, Stop PAC] from being deemed 'independent' of the Innis campaign." Rather, as the discovery responses the FEC cites demonstrate, Stop PAC Disc. Resps. at 4, Interrog. 6, FEC Exh. 2, Stop PAC's ***actual*** assertion, which the FEC blatantly misstates in its brief, stated in relevant part:

> Had Stop PAC desired to make independent expenditures in support, or on behalf, of Innis, federal law likely would have prohibited it from doing so, or imposed substantial burdens on its ability to do so, because Stop PAC uses some of the same vendors as Innis, which would preclude ***its communications*** in support, or on behalf, of Innis from being deemed "independent."

Id. (emphasis added).

Thus, Stop PAC ***never*** questioned ***its own*** independence from the Innis campaign. Rather, Stop PAC opined that, under federal campaign finance law, any hypothetical "communications" it

[1] "FEC Br." refers to Defendant Federal Election Commission's Memorandum in Support of Motion for Summary Judgment," Doc. #57-1 (Sept. 19, 2014).

made "in support, or on behalf, of Innis" might not be considered "independent" (meaning only that they would be deemed "coordinated expenditures" and count as contributions to the Innis campaign, subject to contribution limits, *see* 2 U.S.C. § 441a(a)(7)(C)).

26. Plaintiffs do not believe that FECA permits Plaintiff Tea Party Leadership Fund ("the Fund") "to give $20,000 to the NRSC right now"—a proposition for which the FEC's brief does not cite any sources or authorities. It appears that the contribution limit is $15,000, and not indexed for inflation. *See* 2 U.S.C. § 441a(a)(2)(B).

ARGUMENT

I. STOP PAC'S CLAIMS REMAIN JUSTICIABLE.

Stop PAC has challenged the six-month waiting period faced by political committees with more than 50 contributors, and that have contributed to five or more federal candidates, *see* 2 U.S.C. § 441a(a)(4), before they are able to contribute the maximum statutory amount of $5,000 per election to each candidate, *compare* 2 U.S.C. § 441a(a)(1)(A) (imposing $2,600[2] per election limit on candidate contributions from such committees until they have been registered for six months), *with id*. § 441a(a)(2)(A) (imposing $5,000 per election limit on candidate contributions on such committees until they have been registered for six months). This claim remains justiciable. Section A demonstrates that Stop PAC has standing, while Section B shows that it has not become moot.

A. Stop PAC Has Standing to Challenge the Six-Month Waiting Period and Discriminatory Contribution Limits

The FEC begins by asserting that Stop PAC lacks standing because "Stop PAC caused its own injury," and therefore cannot trace its alleged injuries to the challenged statutes. FEC Br. at 10. Stop PAC alleges two injuries. The first is Stop PAC's inability to contribute the maximum

[2] Statutory figure adjusted for inflation. *See* 78 FED. REG. 8,530, 8,532 (Feb. 6, 2013).

statutory amount of $5,000 per election to a candidate immediately upon obtaining 50 contributors and making contributions to five candidates. *see* 2 U.S.C. § 441a(a)(4) (requiring political committees that satisfy those requirements to wait six months before qualifying as "multicandidate PACs" and being subject to higher candidate contribution limits).

The second injury is the disparate treatment to which Stop PAC was subjected; it was permitted to contribute only $2,600 per election to the candidates it supported throughout its six-month waiting period, but a materially identical committee that happened to be registered for more than six months was able to contribute $5,000 per election to the candidates it supported throughout that same timeframe. The fact that various primary elections occurred during that waiting period, in which Stop PAC was never permitted to contribute a total of $5,000 to the candidates it supported, merely exacerbates the consequences of the injuries. But the injuries themselves—the delay and the disparate treatment—are a direct result of federal law.

In any event, the FEC's decision to effectively blame Stop PAC for failing to organize itself more than six months before the primaries flies in the face of its own proffered evidence. The FEC contends that "[o]n the dates of the last five general elections, there have been hundreds of active new PACs, *i.e.*, PACs that were less than six months old," including "464 new PACs at the time of the general election on November 5, 2012." FEC Br. at 7. This data confirms the especially pernicious nature of the six-month waiting period. Most ordinary people are not especially interested in becoming involved in the political process until shortly before an election. *See* FEC Br. at 15 ("'It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held.'") (quoting *Citizens United v. FEC*, 558 U.S. 310 (2010)). Thus, under federal law, entrenched, longstanding institutional interests may associate themselves with candidates through their contributions to the maximum statutorily authorized extent (*i.e.*, by

contributing $5,000 per candidate). In contrast, members of the general public—the true grassroots—who are galvanized to action shortly before an election are effectively crippled by comparison, able to associate themselves with their favored candidates through their contributions to a far lesser degree.

B. Stop PAC's Claim is Not Moot

The FEC also contends that Stop PAC's claim has become moot, since it "is no longer subject to the FECA provisions it challenges." FEC Br. at 11. Stop PAC's claims nevertheless remain justiciable because they are "capable of repetition, yet evading review."[3] *S. Pac. Term. Co. v. ICC*, 219 U.S. 498, 515 (1911). In general, a plaintiff cannot invoke this exception to the mootness doctrine unless it faces a risk of being subject to the same challenged provisions in the future. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). As Justices Scalia and O'Connor recognized, however, some of the Court's "election law decisions differ from the body of [its] mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large without ever reaching [the Supreme Court]." *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting).

Indeed, the Court repeatedly has reached the merits of election-related cases despite the fact that the plaintiffs' claims had become moot, and there did not appear to be any reasonable prospect that the plaintiffs would again be subject to the challenged legal provisions. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (holding that a challenge to a waiting period for former political party members to run as independent candidates remained justiciable, even though

[3] In any event, even if this Court concludes—despite binding Supreme Court precedent to the contrary—that Stop PAC's claims are moot and non-justiciable, American Future PAC presently has a pending motion to join this case to maintain the justiciability of Stop PAC's claims.

the election had occurred, and "no effective relief can be provided to the candidates or voters," since "the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections"); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) ("Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'"); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (adjudicating challenge to "three-month residency requirement" for voting, even though "appellee can now vote," because "the problems to voters posed by the Tennessee residence requirements is "capable of repetition yet evading review"); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Numerous circuits have recognized that plaintiffs in cases pertaining to some aspect of the electoral process may continue to litigate a lawsuit that has become moot, even if they do not contend that they will be subject to the challenged provisions again. Perhaps the most striking example is *Catholic Leadership Coalition of Tex. v. Reisman*, No. 13-50582, 2014 U.S. App. LEXIS 15558, at *49 (5th Cir. Aug. 12, 2014), in which the plaintiffs challenged a state law imposing waiting periods on certain political committees that wished to make political contributions and expenditures. Despite the fact that the plaintiff's waiting period had elapsed, and it would never again be subject to the waiting period, the Fifth Circuit reached the merits ot its claim.

Following Supreme Court precedent, the Fifth Circuit "dispense[d] with the same party requirement" because *Reisman*, although pertaining to campaign finance, was deemed an "election case[]." *Id*. at *29. The court "focus[ed] instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large." *Id*. (quotation marks

omitted). The court explained, "[I]n election law cases such as this one, where (1) the state plans on continuing to enforce the challenged provision, and (2) that provision will affect other members of the public, the exception [to the same-party requirement] is met." *Id*. at *29-30; *see also Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005). This case also involves a waiting period in campaign finance law, and this Court should follow *Reisman*'s lead and recognize its continued justiciability.

II. THE FEC IS NOT ENITTLED TO SUMMARY JUDGMENT ON STOP PAC'S CHALLENGE TO THE DISCRIMINATORY CANDIDATE CONTRIBUTION LIMITS

A. The Supreme Court Has Never Considered the Specific Claim that Stop PAC is Asserting Here

The FEC contends that *Buckley v. Valeo*, 424 U.S. 1 (1976), forecloses Stop PAC's claims because "the Supreme Court directly affirmed the constitutionality of the six-month period (and other qualifying criteria)" for achieving multicandidate PAC status. FEC Br. at 11-12. The sweeping, blunderbuss facial challenge of the *Buckley* plaintiffs was dramatically different than Stop PAC's narrow, as-applied claim here. The *Buckley* plaintiffs apparently sought to dismantle the entire multicandidate PAC system; they brought a collective challenge to ***all*** of the qualification requirements, including the minimum number of required contributors, minimum number of supported candidates, and the registration period. *Buckley*, 424 U.S. at 35. Moreover, they did not claim that the requirements were collectively causing any similarly situated or materially identical groups to be treated differently. Finally, they did not contend that these requirements were unconstitutional as applied only to particular committees or groups. Rather, the *Buckley* plaintiffs broadly contended that "these qualifications unconstitutionally discriminate against ad hoc organizations in favor of established interest groups." *Id*.

Here, in contrast, Stop PAC is specifically challenging ***only*** the six-month waiting period, and ***only*** as it applies to non-party, non-candidate committees that satisfy 2 U.S.C. § 441a(a)(4)'s other requirements. Moreover, Stop PAC is bringing an "apples-to-apples" claim. It argues that the Equal Protection Clause prohibits the government from subjecting a political committee that has been registered for less than six months to a lower candidate contribution limit than another committee that is materially identical in every way, except for the fact that it has been registered for more than six months.

The reasoning underlying the rulings of both the Supreme Court and the D.C. Circuit on this issue demonstrate that their holdings do not apply to Stop PAC's claims. The Court held that the challenged requirements for multicandidate PAC status collectively "serve the permissible purpose of preventing ***individuals*** from evading the applicable contribution limits by labeling themselves committees," while permitting "bona fide groups to participate in the election process." *Buckley*, 424 U.S. at 35-36 (emphasis added). Here, in contrast, Stop PAC seeks to extend the heightened candidate contribution limit of $5,000 per election ***solely*** to groups that, like the multicandidate PACs to which that heightened limit currently applies, have received more than 50 contributions and contributed to at least five candidates. It contends that the six-month waiting period is unconstitutional ***as applied*** only to such entities. Thus, the very terms of Stop PAC's claim ensure that "individuals," *Buckley*, 424 U.S. at 35-36, groups of "two or three persons," and "dummy committees . . . of a few persons," *Buckley v. Valeo*, 519 F.2d 821, 857-58 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1977), would remain barred from attempting to masquerade as a multicandidate PAC to take advantage of higher contribution limits. In short, Stop PAC's narrow, as-applied challenge differs dramatically from the sweeping facial

challenge litigated in *Buckley*, and neither the reasoning nor the holdings of the D.C. Circuit or Supreme Court apply to Stop PAC's claim, much less "control[]" it, FEC Br. at 12.

B. Stop PAC Has Established that the Six-Month Waiting Period on Contributing the Maximum Statutorily Authorized Amount to a Candidate Violates the First Amendment

This Court should deny the FEC's motion for summary judgment because Stop PAC has established that the First Amendment prohibits the Government from imposing a six-month waiting period on a political committee's ability to exercise its fundamental First Amendment right to associate with the candidates it supports, to the maximum extent statutorily permitted, by contributing $5,000 per election to them. The FEC concedes that, because restrictions on political contributions burden First Amendment rights, they are subject to heightened constitutional scrutiny and are permissible only if "'closely drawn' to further an 'important interest.'" FEC Br. at 12 (quoting *Buckley*, 424 U.S. at 25). It further acknowledges that the constitutionally valid interests that contribution limits may seek to promote are combatting either actual or apparent *quid pro quo* corruption, or circumvention of otherwise constitutionally valid limits. *Id*. (citing *Buckley*, 424 U.S. at 26-27; *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)). Finally, the FEC recognizes, however begrudgingly, that it must muster actual evidence to support its contention that the six-month waiting period both advances one of those interests, and is a reasonably tailored means of doing so. *Id*. (citing *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*")); *cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) (holding that "mere conjecture" is inadequate to establish the constitutionality of restrictions on political contributions).

1. The FEC Has Failed to Establish That the Six-Month Waiting Period Furthers a Sufficiently Important Government Interest

The FEC is not entitled to summary judgment, because the six-month waiting period that certain committees face before being able to associate with the candidates they support by contributing the maximum statutorily permitted amount of $5,000 per election does not further an important government interest. The FEC flatly asserts that the six-month waiting period prevents "'two or three persons'" from "'acquiring'" a $5,000 candidate contribution limit "'merely by organizing themselves' as a 'dummy' political committee." FEC Br. at 13-14 (quoting *Buckley*, 519 F.2d at 857-58). Federal law provides, however, that a political committee must receive contributions from more than 50 people to qualify as a multicandidate PAC. 2 U.S.C. § 441a(a)(4). Thus, the FEC's concern already is addressed by an entirely different provision of the statute—an independent and reasonable prophylaxis upon which the additional, unreasonable prophylaxis of a waiting period cannot rest. The six-month waiting period plays absolutely no role in ensuring that a multicandidate PAC subject to the heightened $5,000 candidate contribution limit is comprised of more than "two or three persons." FEC Br. at 13-14 (quotation marks omitted). To the contrary, the ***only*** function of the six-month waiting period is to ensure that a political committee that has satisfied the other statutory requirements—that is, a committee with more than 50 contributors (not just "two or three"), and that has contributed to five or more candidates—is required to wait for up to a half-year before being able to make the maximum statutorily authorized contributions to the candidates it supports.

The FEC further contends that a "risk of circumvention" remains even after a political committee has received contributions from more than 50 people, and contributed to five or more candidates. FEC Br. at 14. It later reiterates that the six-month waiting period combats "the risk that a PAC is not a ***real multicandidate PAC*** and instead is simply a circumvention tool formed

by supporters of a particular candidate." *Id*. at 15 (emphasis added). This sentence reveals the fundamental flaw at the heart of the FEC's argument. The FEC believes that some political committees that have received more than 50 contributions and have contributed to at least five candidates are "real multicandidate PACs," and others are mere "circumvention tools," and the six-month waiting period somehow helps to distinguish or filter them.

The FEC completely fails to explain, however, ***what it means*** when it contends that a political committee with more than 50 contributors, and that has contributed to at least five candidates, is a mere "circumvention tool." *Id*. When the D.C. Circuit and Supreme Court spoke of the risk of circumvention, they were referring to the possibility that an "individual," *Buckley*, 424 U.S. at 35-36, group of "two or three persons," or "dummy committee[] . . . of a few persons," *Buckley*, 519 F.2d at 857-58, would "label themselves committees" in order to take advantage of the heightened contribution limits. An entity that has received contributions from 50 or more people, in contrast, ***is inherently*** a "bona fide group[]" comprised of over four dozen people (and, typically (as here), hundreds or thousands of people) who wish to collectively "participate in the election process," *Buckley*, 424 U.S. at 35-36 (emphasis added). A person who contributes to a group of that nature is not improperly circumventing contribution limits, but rather furthering the collective mission of dozens, hundreds, or thousands of people beyond himself. Thus, it is a categorical error for the FEC to contend that some groups with over fifty contributors are not "real," but rather fraudulent "circumvention tools." FEC Br. at 15. The FEC's purported desire to frustrate the efforts of such purported "circumvention tools" therefore is not a valid interest.

The FEC points out that "[e]ven with the six-month period in place, PACs are often short-lived operations that proliferate just prior to elections and spend significant amounts of money, only to disappear before the next election." FEC Br. at 16. It seems to be suggesting that a group

of 50 or more contributors that chooses to support five or more candidates in a single election is somehow more likely to be a "circumvention tool" than an identical group that chooses to support those same candidates over the course of several elections. Again, nothing in the D.C. Circuit's or Supreme Court's explanation of constitutionally legitimate circumvention concerns supports such an analysis. *Buckley*, 424 U.S. at 35-36; *Buckley*, 519 F.2d at 857-58.

As both the Supreme Court and the FEC itself have expressly recognized, "'It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held.'" FEC Br. at 15 (quoting *Citizens United v. FEC*, 558 U.S. 310 (2010)). People's decisions to join together in the months before an election to collectively further their shared political goals do not become suspect simply because the group dissipates in the two-year interregnum between federal elections. Under the FEC's view, the longstanding, institutionalized power brokers deeply entrenched within the Beltway establishment are entitled to special consideration, while the upstart grassroots citizen groups that coalesce in the months leading up to elections to have their voices heard in response to an often unresponsive Government must be viewed with heightened skepticism. The Constitution does not allow Congress—which is comprised of incumbents with close ties to those institutionalized interests—to tilt the playing field in this manner. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983) ("A burden that falls unequally on new or small political parties . . . impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against . . . those voters whose political preferences lie outside the existing political parties.").

The FEC also argues that a six-month waiting period is necessary in part because political committees can satisfy the other requirements for achieving multicandidate PAC status too "quickly." FEC Br. at 15. It complains that, "but for the six-month period, Stop PAC would have

obtained the increased contribution limit in just over three weeks." *Id*. It appears that the FEC is arguing either that the Government has an interest in promoting delay for its own sake, or that such delay inherently furthers the Government's anti-corruption and anti-circumvention missions. The FEC completely misapprehends the nature of First Amendment rights. The Government generally may not force an entity to delay fully exercising its fundamental First Amendment rights of speech and association until the Government decides that it is permissible to do so—particularly when such a waiting period extends for a half-year. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167-68 (2002); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996); *see also Catholic Leadership Coalition of Tex. v. Reisman*, No. 13-50582, 2014 U.S. App. LEXIS 15558, at *49 (5th Cir. Aug. 12, 2014).

Additionally, the FEC has chosen to ignore the contradiction at the heart of its argument. It has neglected to explain why, if it has a constitutionally valid interest in ***limiting candidate contributions*** by certain political committees throughout the first six months of their existence, it simultaneously permits such entities to make ***increased contributions to political parties*** throughout that same period. If the FEC truly fears that some of these newly registered committees are fraudulent "circumvention tools," FEC Br. at 15, it completely defies logic to allow them to contribute roughly ***twice as much*** to national and state political party committees ($32,400[4] and $15,000, respectively, *see* 2 U.S.C. § 441a(a)(1)(B), (D)), than multicandidate PACs that have been registered for more than six months ($15,000 and $5,000, respectively, *see* 2 U.S.C. § 441a(a)(2)(B), (C)). Thus, the FEC cannot credibly maintain that the six-month waiting period is

[4] Statutory amount adjusted for inflation. 78 FED. REG. 8,530, 8,532 (Feb. 6, 2013).

a valid means of attempting to prevent circumvention, at least as applied to groups that have received more than 50 contributions and contributed to five or more candidates.

The FEC halfheartedly contends that the waiting period also promotes the Government's interest in "campaign finance disclosure." FEC Br. at 19-20. As the FEC's brief itself implicitly recognizes, however, the Supreme Court has never held that the Government may impose a contribution limit, or otherwise limit First Amendment activities, to further an interest in promoting campaign finance disclosure. *See* FEC Br. at 12. To the contrary, far from being a basis for justifying contribution limits, the Supreme Court has held that disclosure requirements "often represent[] a less restrictive alternative" than direct limits on constitutionally protected activities the Government may use to prevent actual or apparent *quid pro quo* corruption and circumvention. *McCutcheon*, 134 S. Ct. at 1460. In any event, imposing upon political committees a six-month waiting period for making larger candidate contributions is an odd way of furthering any governmental interest in obtaining more information from those committees.[5]

2. The FEC Has Failed to Establish That the Six-Month Waiting Period is a Reasonably Tailored Means of Furthering a Sufficiently Important Government Interest

Even if this Court accepts the FEC's contention that, as a matter of law, the six-month waiting period furthers its interest in preventing circumvention of otherwise valid candidate

[5] Moreover, a six-month waiting period is a patently overbroad means of attempting to further any disclosure interests the FEC might have. If the FEC is concerned that a committee will be able to qualify for multicandidate PAC status before it has "file[d] at least one disclosure report," FEC Br. at 19, the logical and much more appropriately tailored solution would be to require that an entity that has not previously filed any disclosure reports submit such a report along with its Form 1-M when applying for multicandidate PAC status. Likewise, if the FEC is concerned that "dummy-like PAC[s]" might form and qualify as multicandidate PACs during the "nearly three-week pre-election window," the logical and much more appropriately tailored solution would be to require new multicandidate PACs to file a report at some point during that period. Imposing a blanket six-month waiting period is an unacceptably "attenuated" means of facilitating greater disclosure. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) ("*Colorado I*").

contribution limits, this Court still should deny the FEC's motion for summary judgment because the waiting period is a grossly overbroad means of doing so. To be sufficiently "closely drawn" to survive heightened scrutiny, a restriction on political contributions must not "unnecessar[ily] abridg[e]" First Amendment rights. *Buckley*, 424 U.S. at 25. Because contribution limits "themselves are a prophylactic measure," a court must be "particularly diligent in scrutinizing" other "prophylaxis-upon-prophylaxis" restrictions on political contributions. *McCutcheon*, 134 S. Ct. at 1458 (quotation marks omitted).

The FEC speculates that some political committees with more than 50 contributors and that have contributed to five or more candidates, but that have been registered for less than six months, are not "real multicandidate PACs,"—whatever that means[6]—but rather "circumvention tools." FEC Br. at 15. Rather than attempting to determine which of those committees actually are mere "circumvention tools" based on the voluminous data all committees are legally required to report to the FEC, however, the FEC instead seeks to defend a blunderbuss, categorical, prophylactic six-month waiting period on ***all*** of them.

This is the very opposite of a reasonable tailoring. To the contrary, the waiting period reflects ***absolutely no tailoring***—it applies to ***all committees*** (including those with more than 50 contributors, and that have contributed to five or more candidates), regardless of the actual threat or risk each may pose. In order to prevent some ill-defined form of "circumvention," the waiting period limits the First Amendment rights of all such political committees for half a year. Thus, the waiting period is not a reasonably tailored means of targeting purportedly fraudulent or sham "circumvention tools." Instead, the waiting period is simply a law that, because it applies to all committees, simply might ***happen to apply*** to purportedly sham committees. *Cf. Citizens United*,

[6] Neither the U.S. Code nor the FEC's regulations presently define the term "real multicandidate PAC."

558 U.S. at 362 (holding that the Government may not prohibit independent expenditures from all corporations as a means of "preventing foreign individuals or associations from influencing our Nation's political process"); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("*NCPAC*") (invalidating prohibition on independent expenditures by PACs because, "[e]ven were we to determine that the large pooling of financial resources [by PACs] did pose the potential for corruption or the appearance of corruption," the challenged statute was "not limited to multimillion dollar war chests," but rather "appl[ied] equally to informal discussion groups that solicit neighborhood contributions").

Moreover, at the end of the six-month waiting period, ***every*** non-candidate, non-party committee with more than 50 contributors, and that has contributed to at least five candidates is ***automatically entitled*** to claim multicandidate PAC status, *see* 2 U.S.C. § 441a(a)(4), and heightened candidate contribution limits, *id*. § 441a(a)(2)(A), regardless of how suspicious or concerning their conduct may be. To the extent the FEC is concerned that some entities with more than 50 contributors and that have contributed to at least five candidates are sham "circumvention tools," FEC Br. at 15, nothing about reaching that six-month mark would affect their purportedly fraudulent nature. Thus, it is difficult to understand how a six-month waiting period is a reasonably tailored attempt to frustrate the efforts of purportedly sham or illegitimate groups—particularly as applied to non-candidate, non-party committees that have received contributions from more than 50 people, and contributed to five or more candidates.

3. The FEC's Discussion of Stop PAC Simply Underscores the Fact that the Six-Month Waiting Period is Not a Reasonably Tailored Means of Furthering a Sufficiently Important Government Interest

The FEC argues that "[t]he Court need not look beyond the parties to this case for a paradigmatic example of the risks that a candidate's supporters might establish dummy PACs to

bootstrap the $5,000 limit, were it not for the six-month period." FEC Br. at 16. It points out that Stop PAC's founder and chairperson, Greg Campbell, formed the committee during the 2014 primary season, and did some paid political writing work for Niger Innis' congressional campaign. *See id*. at 16-17; *cf. supra*, "Statement of Disputed Facts," ¶ 9.

Undersigned counsel Dan Backer encouraged Campbell to start Stop PAC. FEC Br. at 16-17. Backer, a practicing campaign finance attorney who serves as outside counsel and treasurer for numerous political and candidate committees, was outside counsel and treasurer for Innis' campaign at the time, and Campbell secured his volunteer services as Stop PAC's outside counsel and treasurer. *Id*. at 17. During the campaign, Backer, Campbell, and Innis all attended the same fundraiser hosted by Sheldon Adelson. *Id*. Later, Stop PAC contributed the maximum statutory amount of $2,600 to Innis. *Id*. Having recounted these facts, the FEC triumphantly concludes, "This scenario illustrates precisely the risk of potential circumvention that Congress intended the six-month 'protective shield' to guard against." *Id*. at 17-18.

This discussion of Stop PAC does nothing to demonstrate the constitutionality of the six-month waiting period. ***First***, although the FEC is apparently attempting to cast aspersions on the allegedly "extraordinarily close ties" among Stop PAC, Campbell, Backer, and Innis, FEC Br at 16, it does not actually contend that anyone violated any federal laws or regulations. Instead, it seeks to bolster its case through insinuation, innuendo, and implications of wrongdoing. *Id*. at 18 n.14 (speculating that Stop PAC "may be an authorized committee of . . . the Innis campaign").[7]

[7] The FEC has attempted to bolster its failing argument by misstating Stop PAC's testimony about its relationship with the Innis campaign. The FEC falsely contends that "Stop PAC itself stated that it feared it would not be considered legally 'independent' of the Innis campaign" if it made expenditures concerning him. FEC Br. at 17 (citing FEC Facts ¶ 15). Stop PAC's ***actual*** assertion states in relevant part:

> Had Stop PAC desired to make independent expenditures in support, or on behalf, of Innis, federal law likely would have prohibited it from doing so, or imposed

If these purportedly "close ties" violate federal law or FEC regulations, then the FEC can achieve its anti-circumvention interests much more directly, and in a much more tailored fashion, by enforcing those laws or regulations—steps it has not taken. If these purportedly "close ties" do not violate federal law or FEC regulations, then the FEC lacks a valid interest in attempting to hinder the constitutionally protected activities of these people and groups by imposing an artificially low contribution limit for six months.

Second, if the FEC claims an interest in scrutinizing or regulating "close ties" between a political committee and a candidate, a blanket six-month waiting period that does not even attempt to take into account whether ***any*** concerning ties exist between a political committee and a candidate is a ridiculously overbroad means of doing so. Rather than being tailored in any way to entities that raise potential concerns, the six-month waiting period simply applies to all political committees; such a dragnet is the very antithesis of tailoring.

Third, had Innis won his primary election, Stop PAC presently would be permitted to contribute $5,000 to him for the general election (since its waiting period has expired). All of the FEC's purported concerns about the relationship among Stop PAC, Backer, Campbell, and Innis remain. Yet because Stop PAC satisfies the statutory requirements for qualifying as a multicandidate PAC (including expiration of the six-month waiting period), *see* 2 U.S.C. § 441a(a)(4), it could now contribute the maximum statutory amount to Innis. Again, to the extent

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> substantial burdens on its ability to do so, because Stop PAC uses some of the same vendors as Innis, which would preclude ***its communications*** in support, or on behalf, of Innis from being deemed "independent."

Stop PAC Disc. Resps. at 4, Interrog. 6, FEC Exh. 2 (emphasis added).

Thus, Stop PAC ***never*** questioned ***its own*** independence from the Innis campaign. Rather, it merely expressed concern about whether any ***communications*** it made in support of Innis would be deemed "independent expenditures" or coordinated expenditures under federal law.

the FEC contends that Stop PAC's actions demonstrate the need for the waiting period, it is an exceedingly poorly crafted means of achieving the FEC's increasingly ephemeral goals.

C. Stop PAC Has Established that the Six-Month Waiting Period on Contributing the Maximum Statutorily Authorized Amount to a Candidate Violates the Equal Protection Component of the Fifth Amendment

The FEC is not entitled to summary judgment on Stop PAC's Equal Protection claims. Stop PAC challenges the fact that, under federal law, a non-party, non-candidate committee with more than fifty contributors, and that has contributed to five or more candidates, but has been registered for less than six months, may contribute only $2,600 per election to a candidate, 2 U.S.C. § 441(a)(1)(A), while a materially identical committee that has been registered for more than six months may contribute $5,000 per election to a candidate, *id*. § 441(a)(2)(A). The FEC begins by contending that this distinction is subject only to "rational basis scrutiny," because "this case involves no suspect class or fundamental right." FEC Br. at 26.

This argument is irreconcilable with the FEC's earlier concession that contribution limits are subject to "an intermediate level of scrutiny" precisely because they burden the fundamental First Amendment right of freedom of association (and, to a far lesser extent, freedom of speech). FEC Br. at 12 (citing *Buckley*, 424 U.S. at 20, 25). The FEC cannot disclaim these positions for Equal Protection purposes. Moreover, the Supreme Court has expressly held that "a selective restriction on expressive conduct" is unconstitutional if it is "far greater than is essential to the furtherance of a [substantial] interest." *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 102 (1972); *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) ("*CalMed*") (holding that a contribution limit "violates the equal protection component of the Fifth Amendment," if it "burdens the First Amendment rights of [some] persons . . . to a greater extent than it burdens the

same rights" of comparable entities, and "such differential treatment is not justified").[8] Because contribution limits burden First Amendment rights, discriminatory limits are subject to heightened scrutiny under the Equal Protection Clause.

The FEC also attempts to deflect Stop PAC's Equal Protection argument by pointing out that campaign finance law imposes different limits for different types of entities, such as individuals, political committees, corporations, and foreign nationals. FEC Br. at 23. Plaintiffs do not dispute the underlying point that the Equal Protection Clause permits different types of entities to be treated differently, as the *CalMed* Court properly concluded, 453 U.S. at 200. This does not undermine their argument, however, that the current contribution limits impermissibly discriminate among materially identical committees, by imposing different limits based solely on the length of time they have been registered with the FEC. Unless distinguishing between committees with fifty contributors, that have contributed to five or more candidates, and that have been registered for less than six months on the one hand, and such committees that have been registered for more than six months on the other hand, is a reasonably tailored means of furthering a sufficiently important interest, this Court must invalidate the discriminatory limits.

The FEC points out that "Stop PAC" and Plaintiff Fund "are radically different," and then leaps to the conclusion that "[n]ew and multicandidate PACs are therefore not similarly situated." FEC Br. at 25. Plaintiffs do not contend that ***every single*** recently registered political committee

[8] The FEC cites *Blount v. SEC*, 61 F.3d 938, 946 n.4 (D.C. Cir. 1995), for the proposition that Equal Protection challenges to contribution limits are subject to only rational-basis scrutiny. The D.C. Circuit expressly noted, however, that the Petitioner simply "toss[ed] into his opening brief a footnote" raising the Equal Protection issue. In *Wagner v. FEC*, 854 F. Supp. 2d 83, 96 (D.D.C. 2012), in contrast, where the plaintiff squarely and fully raised the Equal Protection issue, the court properly held, "[T]o survive an equal protection challenge, § 441c's ban on contributions by federal contractors must be closely drawn to match a sufficiently important interest.") (quotation marks omitted), *vacated on jurisdictional grounds*, 717 F.3d 1007 (D.C. Cir. 2013).

with fifty contributors that has contributed to five or more candidates, is materially identical to ***every single*** multicandidate PAC. Rather, Plaintiffs challenge the distinction drawn in the law itself, 2 U.S.C. § 441a(a)(4). A committee that has more than fifty contributors and has contributed to five or more candidates, but has been registered for less than six months, is "similarly situated" to a committee with the same number of contributors, that supports the same number of candidates (indeed, perhaps the very same candidates), engages in the same activities, and has the same goals, but has been registered for more than six months, yet is subject to substantially different contribution limits. *Veney v White*, 293 F.3d 726, 730-31 (4th Cir. 2002) (quoted in FEC Br. at 24). ***That*** is the impermissible discrimination, permitted by federal law, Plaintiffs challenge. Unlike in *CalMed*, it is impossible to contend that these two groups of committees "have differing structures and purposes" and therefore "require different forms of regulation." 453 U.S. at 201.

As discussed earlier in this Memorandum, the distinction drawn by the six-month waiting period cannot survive heightened constitutional scrutiny, because it neither furthers an important government interest nor is closely drawn to promoting any such interest. Thus, it fails Equal Protection scrutiny, as well, and the FEC's request for summary judgment should be denied.

III. THE FEC IS NOT ENITTLED TO SUMMARY JUDGMENT ON THE FUND'S CHALLENGE TO THE DISCRIMINATORY POLITICAL PARTY CONTRIBUTION LIMITS

The FEC is not entitled to summary judgment on the Fund's challenge to the discriminatory limits on contributions to political party committees. As noted earlier, a central deficiency with the FEC's argument is that it has failed to explain why, once an entity with the requisite number of contributors and that has made the required number of contributions reaches its six-month mark, the amount it may contribute to a candidate nearly ***doubles***, while the amount it may contribute to a political party committee gets ***slashed in roughly half.*** Such disparate treatment cannot survive

any form of heightened constitutional scrutiny. Especially since the FEC spends most of its brief justifying the six-month waiting period on candidate contributions by explaining the risks of corruption and circumvention that newly formed political committees purportedly pose, the FEC cannot credibly contend that established entities with a track record of being *bona fide* "broad-based citizen interest groups" may be permitted to contribute less than such entities to political party committees. FEC Br. at 25.

Finally, the FEC argues that permitting multicandidate PACS to contribute less to party committees than recently formed PACs is necessary to "allow[] parties to maintain their important role in the political system" and to recognize the "important role that individuals play in funding political-party activity." *Id*. at 28. As an initial matter, neither of these justifications are a constitutionally sufficient reason for imposing contribution limits. As discussed earlier, the Court has held that contribution limits are permissible only if they are reasonably tailored to combatting actual or apparent *quid pro quo* corruption or circumvention of otherwise valid limits. *Buckley*, 424 U.S. at 26-27; *McCutcheon*, 134 S. Ct. at 1441. Thus, the FEC's rationales for upholding the reduction in political party contribution limits for multicandidate PACs fail as a matter of law.

Moreover, the FEC's explanation is tautological. The only reason that individuals play an "important role . . . in funding political-party activity," FEC Br. at 28, is because the FEC allows them to contribute twice as much. The FEC cannot defend the constitutionality of discriminatory contribution limits by explaining that they are necessary to preserve the current system. Thus, the FEC has failed to establish that it is entitled to summary judgment on the Fund's challenge to political party contribution limits.

CONCLUSION

For these reasons, this Court should DENY the FEC's Motion for Summary Judgment.

Respectfully submitted,

October 3, 2014

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CERTIFICATE OF SERVICE

I, Dan Backer, hereby certify that on this 3rd day of October 2014, I did cause a true and complete copy of the foregoing Plaintiffs' Memorandum in Opposition to FEC's Motion for Summary Judgment to be served via electronic mail on:

/s/ Dan Backer
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